No. 13677

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEVERO RUIZ CHAVEZ, also known as CAYETANO MENDEZ,

Appellant,

vs.

JAMES MCGRANERY, as Attorney General of the United States, and H. R. LANDON, as District Director of Immigration at Los Angeles,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

I.

Jurisdiction of the Court.

On July 2, 1952, the appellant filed in the Court below, a "Petition for Judicial Review or Habeas Corpus." [Tr. 3-13.]

The appellant was not then nor has he been in custody. Appellant claimed jurisdiction there under Section 10 of the Administrative Procedure Act, Public Law 404, 79th Congress, Chapter 325. [Tr. 11.]

On October 31, 1952, the Court below docketed and entered a Judgment of Dismissal for lack of jurisdiction

of the person of the Attorney General and failure to join an indispensable party. During the pendency of this appeal, on March 16, 1953, the Supreme Court rendered its decision in *Heikkila v. Barber,* 345 U. S. 229, holding at pages 234, 235, that a deportation order may be attacked only in a habeas corpus proceeding. An Appellate Court, in disposing of a case, must consider any change of law or fact which has occurred since the judgment was entered.

Patterson v. Alabama, 294 U. S. 600, 607.

Where, as here, the subsequent decision of the Supreme Court shows that the District Court, and hence this Court has no jurisdiction of the subject matter, Federal Rules of Civil Procedure 12(h) applies. The pertinent portion of that rule is:

> "* * * Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action. * * *"

It is submitted therefore, that the appellant's Complaint in the Court below, having been filed July 2, 1952, for judicial review, instead of habeas corpus (the petitioner not being in custody), and Judgment of Dismissal having been docketed and entered on October 31, 1952, this Court lacks jurisdiction of the subject matter and the appeal should be dismissed.

Zank v. Landon (9th Cir., June 19, 1953), 205 F. 2d 615.

II.

Statement of Facts.

Appellant is an alien, a native and citizen of Mexico who last entered the United States on or about November 18, 1938, near the port of El Paso, Texas. As admitted in the appellant's Complaint, at the time of his entry he was not in possession of an immigration document, visa, passport, or other travel document, which permitted him to enter and remain permanently in the United States. [Tr. 4, 16.]

At a hearing pursuant to a Warrant of Arrest issued in 1947 by the Immigration and Naturalization Service, having been advised of his right to do so, the petitioner made application for the privilege of suspension of deportation under the discretion granted to the Attorney General by Section 155(c), Title 8, U. S. C. A.; appellant's application was accepted and a hearing granted; it was determined that the appellant is a citizen of Mexico subject to deportation on the ground that at the time of entry he was an immigrant not in possession of a valid immigration visa; petitioner meets the statutory requirements for eligibility for voluntary departure pursuant to 8 U. S. C. A., 155(c)(1), and for suspension of deportation pursuant to 8 U. S. C. A., 155(c)(2); an order was made granting petitioner the privilege of voluntary departure under the authority vested in the Attorney General by Section 155(c)(1). [Tr. 8, 16.]

III.

Statement of the Case.

It is an undisputed fact that the appellant is a citizen of Mexico illegally present in this country and is deportable. As a deportable alien, he sought the exercise of the discretion vested in the Attorney General to grant the privilege of suspension of deportation. The Attorney General, in the exercise of his discretion, granted the privilege of voluntary departure, but did not grant suspension of deportation.

The appellant, dissatisfied with the result of the discretion exercised by the Attorney General, filed his Petition for Judicial Review naming the Attorney General and the local District Director of Immigration as respondents. His Petition alleged that the failure to grant him discretionary relief suspending his deportation was capricious, arbitrary and unwarranted and a violation of 8 U. S. C. A., 155. The review that the appellant sought was a review of the discretion of the Attorney General, or those acting for him, in denying to the appellant suspension of deportation.

The appellees moved for a dismissal on the ground of lack of jurisdiction of the person of the Attorney General, improper venue, insufficiency of process, insufficiency of service of process and failure to join an indispensable party.

The lower Court, after filing its Memorandum of Decision, which is reported in 108 F. Supp. 255, entered a Judgment of Dismissal on the ground of lack of jurisdiction of the person of the Attorney General and failure to join an indispensable party. This appeal followed. [Tr. 20, 21, 22.]

IV.

Argument.

That this Court lacks jurisdiction of the subject matter has been called to the Court's attention under "I. Jurisdiction," *supra,* and will not be further discussed in this brief.

The appellant named Attorney General McGranery, the then Attorney General, as a party respondent in the Court below. The Attorney General however was not personally served with process nor may he be served in this district, since his residence is in the District of Columbia.

Connor v. Miller (2d Cir., 1949), 178 F. 2d 755.

The Attorney General did not file an Answer nor waive the jurisdictional requirements.

With respect to the appellant's dissatisfaction with the result of the discretion exercised by the Attorney General, the Court, assuming it had jurisdiction over the person of the Attorney General, could not afford relief as Congress has committed the exercise of that discretion to the Attorney General alone, and the Court may not substitute its discretion.

Savala-Cisneros v. Landon (D. C. Cal.), 111 F. Supp. 129, 130;

Adel v. Shaughnessy (2d Cir., 1950), 183 F. 2d 371, 372;

United States ex rel. Kaloudis v. Shaughnessy (2d Cir., 1950), 180 F. 2d 489;

United States ex rel. Salvetti v. Reimer (2d Cir.), 103 F. 2d 777;

United States ex rel. Weddeke v. Watkins, 166 F. 2d 369;

United States ex rel. Zeller v. Watkins (2d Cir.), 167 F. 2d 279, 282;

United States ex rel. Bartsch v. Watkins (2d Cir.), 175 F. 2d 245;

United States ex rel. Walther v. District Director of Immigration and Naturalization (2d Cir.). 175 F. 2d 693;

Sleddens v. Shaughnessy (2d Cir.), 177 F. 2d 363, 364.

If there has been a clear abuse of discretion, the Court can require the Attorney General to exercise his discretion properly. If there has been a failure to exercise discretion, the Court can only require that the discretion be exercised.

Adel v. Shaughnessy, supra.

Such an order can be made only by a Court exercising jurisdiction over the person of the Attorney General.

Savala-Cisneros v. Landon, supra.

The petitioner cannot proceed against the local District Director of Immigration alone. He has no discretion in the matter. The hearing officer, acting under the local District Director of Immigration, found that the petitioner was not ineligible for naturalization. [Tr. 7.] He *recommended* that the appellant be required to voluntarily depart from the United States. [Tr. 8.] It was the Board of Immigration Appeals that *ordered* that the petitioner be granted voluntary departure. The Board of Immigration Appeals was exercising the delegated power

of the Attorney General. Thus, applying the tests of *Williams v. Fanning* (1947), 332 U. S. 490, a decree which expended itself on the District Director as the only respondent before the Court could not grant the relief the petitioner is seeking. The relief which the appellant is seeking *requires affirmative action on the part of the District Director's superior.*

It follows that the Attorney General is an indispensable party.

Williams v. Fanning, supra;
Daggs v. Klein (9th Cir.), 169 F. 2d 174.

If then, as we contend, the Attorney General is an indispensable party, and under 28 U. S. C., 1391(b) could be sued only in the District of Columbia, it follows that the District Court for the Southern District of California lacked jurisdiction to grant the relief sought by the petitioner.

Blackmar v. Guerre, 342 U. S. 512.

Where an indispensable party is not before the Court, the only possible course for the Court to pursue is to dismiss.

Ernest v. Fleissner, 28 F. Supp. 326;
Barr v. Rhodes, 35 F. Supp. 223;
Moore's Federal Practice, Sec. 19.04, p. 2160.

V.

Conclusion.

It should be borne in mind, and the Court is respectfully requested to make special note of the fact, that the appellant does not dispute his deportability here. He admits that he entered the country illegally. He seeks only to review the discretionary denial of suspension of deportation. Thus, in this case, we have something "special" upon which to base our claim to a lack of an indispensable party. It is the fact that *only* the *Attorney General* can exercise the discretionary grant of suspension of deportation. He is the one who must be affected by the Court's order if relief is to be granted at all. However, there is growing strength in the law, that wherever a deportation order is reviewed apart from a habeas corpus proceedings, that the Attorney General or the Commissioner of Immigration is a necessary party to the action. Such has been the view expressed in such decisions as:

Connor v. Miller (2d Cir., 1949), 178 F. 2d 755;

Podovinnikoff v. Miller (3d Cir., 1950), 179 F. 2d 937;

Slavik v. Miller (3d Cir., 1950), 184 F. 2d 575; and

Paolo v. Garfinkel (3d Cir., 1952), 200 F. 2d 280.

And see:

Corona v. Landon (S. D. Cal.), 111 F. Supp. 191;

Medalha v. Shaughnessy (S. D. N. Y.), 102 F. Supp. 950;

Birns v. Commissioner of Immigration and Naturalization (N. D. Ohio), 103 F. Supp. 180.

How much stronger then is the instant case wherein the lacking party is the *only person* to whom Congress has granted the discretion to grant voluntary departure?

As stated by Judge Byrne in *Savala-Cisneros v. Landon, supra* (111 F. Supp. 129 at p. 131):

> "There is *only one person* who has the power to exercise the discretion of granting suspension of deportation to a deportable alien, and that is the Attorney General. He may exercise this power directly or by having a subordinate exercise it for him. If Cisneros complains about anyone other than the Attorney General refusing to grant suspension of deportation, he fails to state a claim upon which relief can be granted. If he complains that the Attorney General has refused to exercise his discretion, he can obtain relief only from a Court with power to order the Attorney General to exercise 'directly a power lodged in him or by having a subordinate exercise it for him.' *Williams v. Fanning, supra* (332 U. S. 490, 68 S. Ct. 189)."

Wherefore, for the reasons set forth above, if the Court determines that it has jurisdiction of the subject matter of this action, and it reaches the question of indispensable party, it is respectfully submitted that the judgment of the District Court in the instant case dismissing the action of the appellant should be affirmed.

Respectfully submitted,

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